IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1222

WESTERN COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
LAS VEGAS VALLEY BROADCASTING CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT LAS VEGAS VALLEY BROADCASTING CO. IN OPPOSITION

EDWARD P. MORGAN
JOSEPH M. MORRISSEY
ROBERT T. MURPHY
Attorneys for Respondent Las Vegas Valley Broadcasting Co.

WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006

March 8, 1979

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1222

WESTERN COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
LAS VEGAS VALLEY BROADCASTING CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT LAS VEGAS VALLEY BROADCASTING CO. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reprinted in Petitioner's Appendix, pp. 1a-16a. The opinion of the Federal Communications Commission is reported at 59 FCC2d 1441 (1976), and appears in Petitioner's Appendix, pp. 17a-54a; recon.

denied, 61 FCC2d 974 (1976), reprinted in Petitioner's Appendix, pp. 55a-61a. The Initial Decision of the Administrative Law Judge ("ALJ") is reported at 59 FCC2d 1463 and is found in Petitioner's Appendix, pp. 62a-142a. Other relevant orders are found in Petitioner's Appendix, pp. 143a-156a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 26, 1978. Western's petition for rehearing and suggestion for rehearing en banc was denied December 29, 1978, Petitioner's Appendix ("Pet. App.") pp. 157a-158a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether there is sufficient evidence of record to support the Court of Appeals' affirmance of the decision of the Federal Communications Commission denying Western's renewal application because of extensive and flagrant fraudulent billing practices and deliberate misrepresentations to the Commission which were designed to conceal its fraudulent operating practices from the Commission.

2. Whether the Court of Appeals properly exercised its function of judicial review of an administrative action in (1) determining that there was insufficient evidence in the record to support the Commission's finding as to the adequacy of Valley's bank letter under applicable law and policy and (2) by remanding the case to the Commission for review of Valley's overall financial qualifications.

STATUTES AND RULES INVOLVED

Relevant provisions of the Communications Act of 1934, the Administrative Procedure Act, as amended, and pertinent Rules and Regulations of the Federal Communications Commission are found in Petitioner's Appendix, pp. 159a-165a.

STATEMENT

In 1971, Western Communications, Inc. ("Western"), an incumbent licensee of KORK-TV, applied for renewal of its television broadcast license for Channel 3, Las Vegas, Nevada. The station is affiliated with the NBC network. Las Vegas Valley Broadcasting Co. filed a competing application for a construction permit for a new television broadcast station to operate on the same channel. The mutually-exclusive applications were set for hearing in 1972.

In 1976, following lengthy proceedings, the Commission found that Western's extensive and protracted fraud in station operations plus its deliberate misrepresentations to the Commission designed to cover-up its dishonest practices compelled the denial of its renewal application. The Commission, on the other hand, found that Valley had "established its qualifications to be a Commission licensee in all respects except its financial qualifications." (Pet. App. 45a) On consolidated appeals, the Court of Appeals affirmed the Commission's order as to Western but remanded Valley's application to the Commission for review of its overall financial qualifications.

Western is a wholly-owned subsidiary of Donrey, Inc., of which Donald W. Reynolds, Sr., is the sole stockholder as well as President and a Director. Channel

3, Las Vegas, is only one of numerous media outlets owned and controlled by Reynolds Sr. Reynolds' extensive media holdings, including a number of other television and radio stations, the largest newspaper in Las Vegas, many other daily and weekly papers, outdoor advertising companies, and CATV interests, etc., were detailed by the Administrative Law Judge and appear in Petitioner's Appendix, pp. 100a-103a. His son, Donald W. Reynolds, Jr., was supervisor over all his broadcast properties during pertinent times involved in the proceedings at the Commission.

Fraudulent Billing

Western's contract with NBC required it to carry all network commercials and specifically forbade any deletions of network programs without prior consent. Weekly reports to NBC were required which certified that each network program including commercial messages and credits was telecast in its entirety except for those specifically listed on the report form. Western's compensation by NBC was based on its broadcast of network commercials.

Edward R. Tabor and Robert N. Ordonez, general managers of KORK-TV during the license period pertinent herein, as officers and directors of Western, undertook a course of action in direct violation of the network contract and the Rule of the Commission applicable to misrepresentation of the quantity of advertising actually broadcast.

In substance, Western, as a matter of policy and general practice, deleted (clipped) portions of network transmissions including network commercials in order to telecast more local commercials than it could otherwise sell and carry. It did not report the deletion of the

network commercials to NBC on its certified reporting forms.[1] Thus, it collected from the network for the omitted advertising as well as from the local advertiser.

Western conceded the "clipping" practices but contended that it only clipped what it termed "clutter." It was found, however, that the "clipping of network commercials was a common occurence." (Pet. App. 133a) This fraudulent practice was properly characterized by the Commission as "protracted and flagrant" as well as "extensive and egregious." (Pet. App. 25a-26a)

Western's deletion of network commercials was confirmed not only by evidence submitted by the Broadcast Bureau of the FCC and by Valley's more extensive analysis but also by Western's own study which indicated the clipping of approximately 800 commercials for which Western made restitution to NBC after the close of the record. (Pet. App. 21a-22a; Court of Appeals Joint App. 1310-1339)

Joining network programs late, leaving them early and extending mid-program breaks in order to run all pre-scheduled local commercials was shown to be a regular KORK-TV practice. A special study submitted by Valley limited to only 28 weeks of the pertinent license renewal period established over 500 occasions when KORK left network programs early, 200 other late joinings of network programs and over 500 mid-break extensions. (Pet. App. 70a-71a) A more confined analysis by the Broadcast Bureau revealed 41 occasions of late joining of network programs ranging from 7 to 30 seconds and 14 occasions of mid-program break extensions from 20 to 50 seconds. (Pet. App. 70a-71a)

---

[1] "None of the station reports indicated any deletions from the network feed." (Pet. App. 22a)

None of these omissions were reported by KORK to NBC on its regular weekly reporting forms on which its compensation by the network was based.[2]

Misrepresentation to the Commission

The practice of clipping network transmissions in order to squeeze in or "overload" local advertising material was particularly egregious in the 1970 World Series broadcasts, prompting an irate fan to bitterly complain to the F.C.C. concerning the interference of the network telecasts of the ball games by local commercials. The Commission called upon KORK-TV (Western) for a complete and honest explanation of all the circumstances surrounding the allegations of the complaint. This inquiry and three subsequent ones in ensuing months were met by responses from Western which were analyzed at length by the Administrative Law Judge (Pet. App. 73a-83a) and by the Commission (Pet. App. 26a-32a) and found to be patently false and misleading and clearly designed to conceal its operating practices from the Commission. (Pet. App. 31a)

Valley's Bank Loan Commitment

Valley's application turned principally upon its ability to secure a bank loan with "reasonable assurance." In conjunction with its original application for a construction permit, filed September 1, 1971, Valley submitted a bank commitment letter, dated August 23, 1971, from Nevada State Bank, Las Vegas, Nevada.

[2]Two extended periods of time when the station was completely off the air for 17 minutes and 45 seconds and for 50 minutes were even omitted from the network reports (Pet. App. 23a).

(Pet. App. 88a-91a) This letter was amended by a letter from the Bank's counsel dated February 22, 1973, changing certain conditions relative to the loan because of Valley's subsequent intention to lease both its land and buildings and to purchase its broadcast equipment from RCA on credit. (Ibid.) In his letter, Bank counsel explicitly stated: "On behalf of the Bank I am authorized to confirm that at no time has the Bank withdrawn its letter of August 23, 1971 to Valley and that the Bank remains willing to make the loan pursuant to the terms stated in said letter." The certain changes in the terms of the agreement included (1) approval of the personal financial statements of Valley's stockholders, each of whom would guarantee payment of the loan; (2) Bank to have right of first refusal on future borrowings by Valley during the 5-year term of the loan; (3) Valley to maintain all its bank accounts exclusively at the Bank; (4) explanation of what was intended by the expression "unimproved capital;" (5) agreement extended to January 1, 1975. Valley expressly agreed to these terms and its shareholders indicated that at all times they stood ready, willing and able to comply with the Bank's requirements.

Inasmuch as the question of collateral under the revised terms of the Bank commitment became a matter of special concern to the ALJ, certain interrogatories were authorized to be propounded to the Bank's president.[3] In substance, the Bank's president stated that the Bank was fully aware that Valley would be unable to pledge as collateral either the RCA technical

[3]The full text of the eleven interrogatories together with answers are set forth in the Initial Decision at paragraph 64. (Pet. App. 91a-94a) The more relevant ones, i.e., Nos. 9, 10 and 11 are found in the lower Court's opinion. (Pet. App. 13a)

equipment or any land or buildings but, nevertheless, the Bank was prepared to make its proposed loan of $1 million as set forth in the 1971 letter subject to a normal routine bank reservation. The final interrogatory, No. 11, and its answer read as follows:

> "11. In addition to the personal guarantee by Valley's stockholders, what is the minimum value of collateral that the bank will require in order to loan Valley up to $1,000,000 as proposed?
>
> "Answer: It will depend upon the conditions at the time the loan is required."

This answer became the basis on which the ALJ and the Commission rested the adverse finding that Valley had failed to demonstrate that it had "reasonable assurance" that the bank loan would eventually be forthcoming. The Court below thoroughly canvassed the record evidence on the bank letter issue and found insufficient support for the Commission's adverse conclusion stating that: "We find insufficient support for the Commission's finding that its [Valley's] bank letter did not meet the reasonable assurance standard, and remand for review of its general financial qualifications." (Pet. App. 10a-11a)

Site Access

Valley proposed to locate its transmitter on a federally-owned mountain site near Las Vegas which is controlled by the Interior Department's Bureau of Land Management (BLM). Access to the site is via two private roads, the first and longer one owned by Bell Telephone which agreed to allow Valley to use the road at an annual charge of $2,000. The second road is owned by Alta Development Co., a company in which Western holds equal shares with Summa Corporation.

Western refused a right-of-way to Valley over this road except on the basis of compensating in full Western's alleged share of the cost of the road's construction and maintenance costs which Western kept raising until the last figure (destined to rise) was $190,000. The Bureau of Land Management indicated that in the event Valley were awarded a construction permit by the F.C.C. it would issue a permit to Valley to use the transmitter site and the Alta access road. However, the policy of the BLM is not to intervene in disputes between original and later permittees as to terms for use of facilities constructed by the original permittee. In early 1973 when Western's estimated demand was $45,000 Valley budgeted $100,000 to purchase the right-of-way. However, the impossibility of firm negotiations with an obdurate Western left the matter in an unresolved state.

The Court of Appeals noting that the Commission had not advised whether "the site access problem, by itself, would warrant a finding of financial disqualification" indicated that this issue could be considered and resolved as part of the Commission's examination of "Valley's complete financial qualifications." (Pet. app. 15a)

"Leak" to the Trade Press

In a multiple series of filings following oral argument before the Commission, Western charged procedural irregularities based on an alleged "leak" to the trade press by Commission personnel as to what the Commission had tentatively decided. Importantly, not a single party of interest in the case was implicated in the allegations nor did the charges touch upon or involve in any way the merits of the case. After careful consideration and appropriate investigation the Commission was

unable to find any legitimate basis for re-opening the record or enlarging the issues as Western requested and specifically found that Western suffered no prejudice whatever by reason of events deemed by the Commission to be "most unfortunate" but harmless to the parties. (Pet. App. 44a)[4]

Similarly, the Court of Appeals considered these allegations and properly concluded that it was unable to discern a genuine *ex parte* question stating further "nor can we identify, on this record, any infringement of due process resulting from such disclosure." (Pet. App. 6a)

Upon careful review of the record, the Court of Appeals affirmed the denial of Western's renewal application, holding that there was substantial evidence to support the Commission's adverse findings, and remanded Valley's application for further review of its overall financial qualifications.

ARGUMENT

There are no important federal questions presented by the petitioner which would justify the grant of a writ of certiorari. The multiple reasons for granting the writ advanced by Western are, essentially, a re-cycle of

[4]The Commission pointedly noted that Western had flooded the Commission with a barrage of pleadings and unauthorized briefs in such a manner as to "have delayed the ultimate resolution of this proceeding and raise a question concerning counsel's compliance with Section 1.52 of our Rules which provides in pertinent part that their signature on each Western pleading certifies their 'belief there is good ground to support it; and that it is not interposed for delay. . . .' Counsel are advised that further pleadings directed to the alleged *ex parte* violations will be summarily dismissed." (Pet. App. 44a, fn. 21)

those presented to the Commission and again in the Court of Appeals where, in both instances, they were found to be completely without merit.[5]

Despite a sophisticated effort to distill from them a suitable and persuasive reason for the grant of the writ, the absence of any genuine and compelling ground for so doing is apparent on the face of this proceeding. Recourse to the decision of the Court of Appeals, the several Decisions of the Commission and the Initial Decision of the ALJ, all appearing in Petitioner's Appendix, pp. 1a-156a, quickly and affirmatively dispells any notion that Western has been denied due process (procedural or substantive) or has been unjustly denied renewal of a privileged license to utilize the public's airways for its private gain. Rather, Western has enjoyed an abundance of process, has received full and fair consideration of its multiple defenses and arguments, and has successfully prolonged its profitable hold on Channel 3 for almost 8 years beyond its last authorized license period.

Similarly, the remand of Valley's application to the Commission for further proceedings involving "consideration of Valley's complete financial qualifications"

[5]The Court of Appeals summarized the claims as follows: "Western claim[ed] that the Commission's denial of its renewal application (A) was not based on substantial evidence, (B) neglected valid defenses presented on Western's behalf and (C) constituted an unjustifiably harsh sanction of conduct not clearly prohibited under prior commission policy." (Pet. App. 4a) As to Valley's appeal, Western, in substance, challenges the verity of the applicable standard of review as pronounced by this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951), repeated in others and which was faithfully followed by the Court of Appeals in this case.

(Pet. App. 15a) in no way constitutes a legitimate and persuasive reason for the grant of the extraordinary writ of certiorari.

Western's specious contentions that serious and important federal questions having wide and general application are presented by the decision of the Court of Appeals in respect to (1) Standard Of Proof; (2) Sanction and Defense; (3) Leak to Trade Press; and (4) Remand of Valley's Application For Further Proceedings, are, hereinafter, addressed seriatim.

Preliminarily, however, by way of background it is important to observe that Western proceeds here, as below, on a sordid and sullied record—a record of the elevation of private corporate greed over the basic notions of public trust accompanying the temporary possession of one of the government's most valuable privileges and "scarce resource"—the use of the public airways for private profit. Western's dishonest conduct was so patently revealed upon this record as to constrain a case-hardened, veteran Administrative Law Judge to denounce it as "dishonesty deserving of the utmost censure" pointing out, *inter alia*, that Western's practice of "selling twice what it could only deliver once, and of collecting for its own benefit the proceeds of both sales" was a more aggravated form of fraud than the classic "double billing" offenses normally encountered. (Pet. App. 133a). The Commission was moved unanimously to refer to petitioner's fraudulent billing not only as "protracted and flagrant" but also "extensive and egregious" (Pet. App. 25a-26a); to denominate Western's responses to Commission inquiries as to just what was going on in their station operations as "false, misleading and evasive representations"; and to properly state that these carefully concocted communications "were clearly designed to conceal its operating practices from the Commission." (Pet. App. 31a) These outright blatant misrepresentations designed to mislead the Commission and to conceal the invidious fraudulent practices of Western had previously been found by the ALJ to be "rife with inaccurate and misleading statements" and "contained deliberate misrepresentations" (Pet. App. 133a), thus compelling the conclusion that these assertions were "false and the station's executives knew it when the letters were written." (Ibid.)

In short, it is difficult to postulate a more explicit tapestery of deceit and dishonesty against which the attack upon the judgment of the Court of Appeals by Western must be viewed.

Standard of Proof

In respect to the standard of proof, there is no important federal question presented on the sullied record of Western's unfaithful trust of a public license in this case.

At the outset, it must be observed that Western implicitly acknowledges that the Court of Appeals correctly reviewed the record in conformity with the requirements of the Administrative Procedure Act and the norm declared by this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951). The appropriate standard of review, as explicated by the Court of Appeals "requires that the Commission's findings be supported by substantial evidence." (Pet. App. 5a) And, pointedly and properly the Court of Appeals found substantial support in the evidence for the Commission's findings adverse to Western's renewal application.

Western's principal attack on the case against its license renewal, both before the Commission and in the Court of Appeals, charged that it was not supported by "reliable and probative" evidence of a "substantial" character. It now suggests that a different standard of proof should be required in *FCC license renewal cases*, namely, the "clear and convincing" standard presumably required by the Court of Appeals in *SEC license revocation* cases where the charge is completely based on circumstantial evidence and results in a practical deprivation of livelihood. *Collins Securities Corp. v. SEC*, 183 U.S. App. D.C. 301, 562 F.2d 820 (1977); *Nassar and Co. v. SEC*, 185 U.S. App. D.C. 125, 566 F.2d 790 (1977). The inference to be drawn is, presumptively, that the record in this case could not measure up to such a different standard. Western's contention in this regard, however, has no real application to the record in this case and constitutes, largely, an exercise in semantics.

Important distinctions between this case and the SEC cases and other authorities advanced by Western are obvious. First, the instant case involved a license *renewal* proceeding not a license *revocation* as in *Collins* and *Nassar*.

Unlike those cases, here there was *substantial direct* as well as *circumstantial* evidence establishing Western's dereliction of duty.

Further a *radically different type of license* is involved here than in the SEC cases—an FCC license is a temporary, contingent license to use a limited and scarce public resource for private gain thereby conferring a special privilege upon the recipient in the nature of a public trust. The broadcast licensee acquires

no property right in the channel, as made plain by statute (47 U.S.C. Sec. 301).[6]

This Court has unequivocally stated that "licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 394 (1969).

The critical differences in license type and classification are cogently explicated in the Report of the Commission in *Sea Island Broadcasting Corp.*, 44 P&F Radio Reg.2d 1265 (1978). There the Commission noted at p. 1267 that: "Broadcasters have a special status as public trustees of a scarce source, namely, the broadcast frequencies. The Supreme Court has noted that because broadcast frequencies are limited, 'they have been necessarily considered a public trust.' " Citing *Red Lion, supra.*

Moreover, refusal to renew a broadcast license is not a penalty as definitively laid down by this Court in *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, 228 (1946). Thus,

---

[6]The Communications Act of 1934 provides in pertinent part: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and periods of the license. . . ." 47 U.S.C. Sec. 301. It further provides that: "No license granted for the operation of a broadcasting station shall be for a longer term than three years . . . Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses . . . if the Commission finds that public interest, convenience and necessity would be served thereby. . . ." 47 U.S.C. Section 307(d).

unlike the SEC cases relied upon by Western, a penalty approaching a deprivation of livelihood is not here involved.[7]

The other and additional cases advanced by Western on standard of proof deal with (a) deportation, (b) denaturalization, (c) involuntary confinement and the like and are completely inapposite.

In any event, however, unlike the shaky and ambiguous record and dubious circumstantial evidence involved in *Collins* and *Nassar, supra*, the weight and quality of the record proof here left neither the hearing officer nor the reviewers with any substantial doubt as to the justification of the non-renewal decision. Indeed, if morality in broadcasting is to have any meaning, no other conclusion could be reached.

Summary reference to only a few parts of the Commission's Decision and the ALJ's Initial Decision demonstrates the clarity and conviction with which the case for non-renewal was established.

Thus, the Commission clearly stated that ". . . the logs establish with *reasonable certainty* that KORK-TV was off network for significantly longer periods than authorized and that as a general practice it clipped all or parts of network commercials in order to telecast local advertising. . . ." (Pet. App. 21a) (Emphasis

[7]Western emphasizes the renewal by the Commission of all of Reynold's other broadcast licenses. *Donald W. Reynolds*, 65 FCC2d 451 (1977). Unlike the securities dealers in *Collins* and *Nassar*, Reynolds has suffered no bar to continuing in the broadcast business—no loss of livelihood. This is an important distinguishing fact and one which is wholly inconsistent with the cry of "stigma plus impairment of future employment" resulting to Reynolds as claimed by Western in a fanciful flight from reality. (Pet. 14)

added.) Again, the Commission in unequivocal language found: "*It is clear*, that the alleged failure by Mr. Tabor and Mr. Ordonez to be aware of the fraudulent nature of the network reports establishes a lack of competence and diligence in their supervision over KORK-TV's affairs which contributed to the fraudulent billing and a gross disregard of the Commission's fraudulent billing rules, which reflects adversely on Western's qualifications to be a Commission licensee." (Pet. App. 23a-24a)

Additionally, obvious and clear misrepresentations advanced in Western's own communications to the Commission are meticulously noted in the Commission's Decision as set forth in Petitioner's Appendix, pp. 26a-32a. The referenced evidence is neither obscure nor circumstantial. Rather, it is "clear and convincing" and while this descriptive language was not employed by the Commission in precise talismanic tandem, the quality and quantity of proof of Western's deceptive practices was obviously of a kind to satisfy any such standard.

The Initial Decision of the ALJ likewise demonstrates that the case for Western's falsity in word and deed was beyond cavil. Thus, the Judge found that it was "*apparent* that KORK's policy to clip network 'clutter' was in deliberate violation of the terms of its contract," [with the network] and "*equally apparent* that its failure to report such clipping in its weekly Station Reports rendered those reports into misrepresentations." (Pet. App. 73a-83a; 132a-133a) Again, the Judge found that "KORK's correspondence with the Commission as to its commercial practices was *rife* with inaccurate and misleading statements. The station was deliberately pursuing a policy of scheduling more local commercials during network breaks than could possibly be accommodated." (Pet. App. 132a-133a) (Emphasis

added.) If required, there can be no doubt that the descriptive adjectives "clear and convincing" could be readily and truly applied to the evidence which was "apparent" and "substantial" and "reasonably certain." To carp, as Western so manifestly does on this score, is truly to elevate form over substance which was, of course, clearly obvious to the Court of Appeals.

The plain fact is that the record in this case as to Western was viewed and examined by the Court of Appeals in accord with statutory requirements and the mandate of this Court in *Universal Camera, supra*, and its progeny and found to be fully supportive of the findings and conclusions of the Commission. (Pet. App. 5a-6a) "On the clipping issue, the factual record supports the Commission's conclusion that KORK substituted local material for network broadcasts. . . . There is also substantial evidence in the record that Western's responses to Commission inquiries involved misrepresentations and lacked candor. The F.C.C. opinion carefully traces Western's inaccurate characterizations of particular incidents and general practices. . . ." (Id. 5a)

The evidence of clipping or deletion of network commercials leading to fraudulent billing was extensive and convincing and was treated at length both in the Initial Decision of the ALJ (Pet. App. 66a-73a), and in the Decision of the Commission (Pet. App. 19a-26a). There are few FCC cases, if any, revealing a more explicit pattern of fraud and deceit than in the instant one.

The accuracy of the charges of deletion of network commercials set forth in the Bill of Particulars of the Broadcast Bureau was conceded by Western and, during the pendency of the cases before the Commission, it compensated NBC for them. (Pet. App. 21a)

A more extensive study by Valley, covering only 1 week in each of 28 months of Western's programming, clearly established that all or part of 250 network commercials were deleted thus conclusively indicating that clipping of network commercials was not a random sometime thing but "a common occurrence" and a regular and frequent practice (Pet. App. 69a-70a), a practice deliberately built into the station policy by its managers both of whom were Western corporate officers.[8]

Western's own analysis substantially confirmed the accuracy of this clear and convincing evidence and moved it, in a burst of belated "contrition," to proffer NBC more than $7 thousand for network commercials billed to NBC but not carried by the station. (Pet. App. 71a-22a)

Moreover, as to the issue of misrepresentation and lack of candor, the record disclosed that on four separate occasions in 1970-1971 the Commission, acting on complaints of the viewing public regarding intrusion of local commercials upon network programs, specifically inquired of Western just what was occurring at the station in this respect. In light of the admitted practices of Western in overloading network breaks with local

---

[8]The painstaking investigation and assembly of documentary evidence through comparison of station logs presented a burdensome challenge not only because of time restrictions but also the sheer enormity of the task. Thus, Valley's indepth investigation and subsequent evidence covered the documents for only 1 week per month for 28 months of the 36 month license period. Western claimed that its station records for the other 8 months were destroyed in a fire at the station in March 1972. The daily and weekly pattern of fraud on a large scale, however, was obvious.

commercials, the responses to these inquiries were, as found by the ALJ and the Commission, "rife with inaccurate and misleading statements" (Pet. App. 133a) designed to conceal the fraudulent practices of the station. The record further discloses, as the Court of Appeals noted, that these investigative inquiries were carefully considered and analyzed by the Commission (Pet. App. 5a; 26a-32a). Likewise, reference to the Initial Decision of the ALJ indicates a concientious and precise evaluation of them at length (Pet. App. 73a-83a; 132a-133a) leading to the inexorable conclusion that "KORK's subject correspondence contained deliberate misrepresentations to the Commission and was lacking in candor regarding its policies and practices in joining network programs after their beginning, leaving network programs before their end, and extending network station or commercial breaks so as to affect the content of the network programs." (Id. 133a)

Because of the vast scope of its oversight responsibilities and the manifold number of its licensees, the Commission must rely on the candor and good faith of those, like Western, entrusted with the use of a property in the public domain—indeed, it must demand it, *Neighborly Broadcasting Co., Inc.*, 24 RR 959, 967 (1963), and "must refuse to tolerate deliberate misrepresentations." *Nick J. Chaconas*, 28 FCC2d 231 (1971). As this Court has noted, deception or lack of candor in F.C.C. operations constitutes a serious impairment of the public interest and the very fact of concealment may be more significant than the facts concealed or the substance of the false statement. *F.C.C. v. WOKO, Inc., supra.* As the Commission noted, these misleading deceptions, standing alone, would constitute sufficient grounds for rejecting Western as a qualified applicant for continued licensing on the

frequency. And, as the Court of Appeals pointedly noted: "The Commission has held, *and the courts affirmed*, that misrepresentation of even immaterial facts is a valid basis for non-renewal." (Pet. App. 8a) Citing: *F.C.C. v. WOKO, Inc., supra*, at 226-227; *Independent Broadcasting Co. v. F.C.C.*, 193 F.2d 900, 902 (D.C. Cir., 1951), cert. denied, 344 U.S. 837 (1952); *Crowder v. F.C.C.*, 399 F.2d 569 (D.C. Cir.), cert. denied, 393 U.S. 962 (1968). (Emphasis added.)

Finally, as the record in this case to date so eloquently demonstrates, the evidence of Western's illegal avarice and chicanery was clear enough to convince (1) a veteran Administrative Law Judge, wise in the ways of the industry (Pet. App. 62a-142a); (2) a unanimous array of the Commissioners of the Federal Communications Commission (Pet. App. 17a-54a); (3) a unanimous panel of seasoned Circuit Court Justices—a panel with a collective record of 53 years of experience in careful screening of F.C.C. and other agency cases (Pet. App. 1a-16a); and (4) the corporation, Western, itself, which was moved to acknowledge the false billings for network commercials covered in the Bureau's Bill of Particulars and those confirmed by its own study (Pet. App. 21a-22a).

Defenses and Sanction

Western complains of disparate treatment by the Commission which the Court of Appeals allegedly condoned. Hence, Western asserts that there is an "important federal question" of wide application requiring the intervention of this Court.

To the contrary, there is neither an important federal question presented nor any valid basis for

complaint other than the normal "post-mortem" railings that not infrequently accompany lost litigation.

First, the Commission gave full, attentive, and reasoned consideration to Valley's defenses, fairly compared the record with those cases involving lesser administrative sanctions and adverted to those reasons which compelled an obvious distinction. (Pet. App. 23a-26a) Further, the Court of Appeals undertook the rational, concise consideration which Western's exaggerated claims merited in light of the sordid, sullied record of deliberate fraud and complete lack of candor as disclosed in the misleading and false responses to Commission inquiries. (Pet. App. 6a-8a) There is no ground for complaint here.

Moreover, as to sanctions, the considerable primary discretion accorded the Commission "in fashioning remedies to maximize compliance with Commission policy" has, in the public interest, been the accepted, judicial rule, as cogently noted by the Court of Appeals in rejecting Western's contentions in this respect. (Pet. App. 8a) Citing: *F.C.C. v. WOKO, supra*, at 228; *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 857 (D.C. Cir., 1970), cert. denied sub nom.; *WHDH, Inc. v. F.C.C.*, 403 U.S. 923 (1971); *Continental Broadcasting, Inc. v. F.C.C.*, 439 F.2d 580, 583 (D.C. Cir.), cert. denied, 403 U.S. 905 (1971); *Lorain Journal Co. v. F.C.C.*, 381 F.2d 824, 831 (D.C. Cir., 1965).

Indeed, the decision of this Court in *F.C.C. v. WOKO, Inc., supra*, is a convincing answer to the unsubstantiated charge of Western here. There a complaint concerning dissimilarity in FCC sanctions was deemed groundless by a unanimous Court with the holding that the Commission is not bound "to deal

with all cases at all times as it has dealt with some that seem comparable." (Id. at 228) Pointing out that "denial of an application for a license . . . is not a penal measure," this Court emphasized the latitude of discretion that must be allowed to the Commission in determining whether "the public interest will be served by renewing the license." Significantly, this Court stated: ". . . the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." (Id. at 229)[9]

In essence, Western's arguments are a repetition of those advanced before the Commission and the Court of Appeals and found to be without merit. The strained effort to dress them in a fashion hopefully to satisfy the requirements for certiorari is singularly unavailing. As noted *supra*, they have been carefully and fairly considered and properly rejected. The credibility of witnesses advancing so-called mitigating defenses is, in the first instance the function of the ALJ as the hearing officer, and, ultimately, the Commission. Dissatisfaction with their judgments with respect to crediting such testimony and evidence constitutes no basis for the intervention of this Court.

---

[9]The principle of agency discretion in choosing sanctions has been reiterated by this Court more recently in *Butz v. Glover Livestock Commission*, 411 U.S. 182 (1973). See also: *American Power and Light Co. v. SEC*, 329 U.S. 90, 112-113 (1946); 4 K. Davis, Treatise on Administrative Law, Sec. 30.10 at 250-251 (1958).

Leak to Trade Press

Western's allegation that a premature "leak" to the trade press of the tentative decision of the Commission following the close or oral argument deprived it of due process, in some vague and undefined manner, was thoroughly considered and investigated by the Commission and found to be without merit. (Pet. App. 143a-156a)

Importantly, none of the parties to the proceeding were involved in the allegations nor did the charged conduct touch upon the merits of the case. After careful and reasoned consideration the Commission found that the substantive matters involved in Western's allegations pertained wholly to the internal procedures of the Commission and failed to establish a "basis for finding that the leaks involved bias or prejudice, indicated prejudgment of the merits of this proceeding, or that additional hearings would do anything more than delay the proceeding, without any likelihood of altering the outcome." *In re Western Communications, Inc., et al.*, 61 FCC2d 974, 975 (1976).

Western's cry of "ex parte," considerably muted if not completely abandoned in this Court,[10] was completely inapposite and without foundation as noted by the Court of Appeals (Pet. App. 6a).

The incident of a temporary lapse in the internal functions of the Commission is closely akin to the press leak of a confidential decision of this Court cited by Western in the Court below. There, this Court denied permission to petitioners to file a supplemental memorandum directed to the alleged impact of the news leak

[10] "Western does not claim that any leak is reversible error." (Pet. Brief, p. 32)

on the rights of the petitioners. No. 76-793, *Erlichman v. U.S.*; No. 76-1081, *Mitchell v. U.S.*, 45 L.W. 3718 (April 28, 1977). Subsequently, this Court denied certiorari without comment on the purported claim of prejudice arising from the premature disclosure to the press. *United States v. Haldeman, et al.*, 431 U.S. 933, 97 S. Ct. 2641 (1977).

Western's contention that "thoughtful consideration of the evidence" was *prima facie* precluded because of the short lapse of time between oral argument and tentative decision is completely at variance with the rubrics of normal agency proceedings. The entire record and the briefs of the parties were before the Commission for review and study for a substantial length of time prior to oral argument, at which, of course, there is no presentation of evidence.[11] Presumably, the Commission—like an appellate court—is familiar with the record and issues involved in the oral argument. Here, the palpable indictment of Western's fraudulent conduct by the overwhelming evidence of record, including its own concession of deleting network transmissions including commercial content, the documented evidence of Western's deliberate misrepresentations and lack of candor in response to Commission inquiries, left little, if any, room for debate or doubt as to its complete lack of requisite qualifications for renewal of its license.

[11] Briefs in this proceeding were filed with the Commission December 2, 1974. Oral Argument was heard by the Commission March 9, 1976.

Remand of Valley's Application

In seeking review of the decision of the court of appeals as it relates to Valley's appeal which centered on the adequacy of Valley's bank letter, Western is patently laboring under a misapprehension. Western incorrectly claims (Pet., p. 33) that the court below undertook extensive *de novo* review of the record in Valley's appeal and then substituted its judgment for that of the Commission on Valley's financial qualifications. Western further claims incorrectly that the Court of Appeals exceeded the bounds of judicial review prescribed by the Administrative Procedure Act, proceeded in conflict with decisions of this Court, and jeopardized a fundamental statutory prerequisite of broadcast licensing.

The record clearly shows that the court of appeals reviewed the entire record pursuant to the applicable requirements of the Administrative Procedure Act, 5 U.S.C. Section 76 and the mandate of this Court. As to Valley's bank letter, it was unable to find the required evidence necessary to support the "substantial evidence" requirement of the Administrative Procedure Act. Being thus unable to find this "substantial evidence" the court of appeals had no choice but to reverse the Commission's decision as it relates to Valley's bank letter.

Western likewise misconstrues the thrust of the cases it cites as support for its incorrect argument that the court of appeals was obligated to uphold the Commission's decision. In both cases cited by Western, *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357 (1965) and *S.E.C. v. New England Electric System*, 390 U.S. 207 (1968), this court clearly stated that decisions of regulatory agencies should be affirmed if the decision has "warrant

in the record" or is "adequately supported in the record." In the instant case, that key factor was totally lacking as to Valley's bank letter. As the court of appeals stated (Pet. App. 10a):

> "We find insufficient support for the Commission's finding that its (Valley's) bank letter did not meet the reasonable assurance standard. . . ."

In support of its incorrect argument that the court below exceeded the proper scope of its judicial review, Western cites *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519 (1978) and *Mobil Oil Corp. v. F.T.C.* 417 U.S. 283 (1974). What Western fails to comprehend is that its so-called scope of review is not applicable to the instant case. *F.C.C. v. National Citizens Committee for Broadcasting* and *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., supra*, both deal with rulemaking procedures of Government agencies. A different standard is applied in such agency rulemaking cases as this Court noted in *F.C.C. v. National Citizens Commission for Broadcasting, supra*, wherein it stated (at p. 801):

> "We agree with the Court of Appeals that regulations promulgated after informal rulemaking, while not subject to review under the 'substantial evidence' test of APA, 5 U.S.C. §706(2)(E), quoted in n. 21, *supra*, may be invalidated by a reviewing court under the 'arbitrary or capricious' standard if they are not rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-416, S.Ct. 814, 822-823, 28 L.Ed.2d 136 (1971)."

In the instant adjudicatory case the Court below correctly applied the "substantial evidence" test. It was unable to find the necessary "substantial evidence" as to the bank letter and had no choice but to reverse the Commission.

Mobil Oil Corp. v. F.C.C., supra, is likewise inapposite. In *Mobil* this Court affirmed a decision of the Court of Appeals for the Fifth Circuit, which decision had affirmed an Order of the Federal Power Commission. This Court stated that the action of the court of appeals in that case was an appropriate exercise of administrative discretion *supported by substantial evidence in the record as a whole.* Again, the key factor of substantial evidence in the record is lacking in the instant case to support the Commission's adverse findings as to the bank letter.

There is no question that the court below correctly followed the procedures outlined in the Administrative Procedure Act, 5 U.S.C. §706(1)(E) applicable to this type of case. The court likewise adhered to the mandate of this Court delineated in its decisions in cases properly applicable to the instant case. [See *Universal Camera Corp. v. N.L.R.B., supra*, and *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. ____, 98 S.Ct. 3463 (1978)]. As required by the Act and the decisions of this Court, the court below, in applying the required "substantial evidence" test, canvassed the record to determine whether the evidence relied upon by the Commission provided the requisite substantial support. The record did not support the Commission's finding. The Court had no choice but to remand.

The correct procedure to be followed by the reviewing courts in cases such as this was clearly spelled out by this Court in *Universal Camera Corp. v. N.L.R.B.,*

supra, and recently reiterated in *Beth Israel Hospital v. N.L.R.B., supra.* In *Universal Camera, supra*, this Court went to great lengths in tracing the Congressional intent and the legislative history of the Administrative Procedures Act as it applies to the scope of judicial review. It pointed out that the Court of Appeals was not completely bound by decisions of Federal agencies. The intent of Congress was made quite clear as to the scope of review required by the Court of Appeals in dealing with the review of decisions of Federal agencies such as the National Labor Relations Board. This Court noted (at 466):

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence of both."

In the instant case the Court of Appeals properly exercised its conventional judicial function. It took the affirmative action required by both the Administrative Procedures Act and the decisions of this Court. While affording full respect to the Commission's findings, it reviewed the record and found lacking the substantial

evidence necessary to support the Commission's findings.

Western finally and incorrectly contends that the Court of Appeals usurped the FCC's statutory role (in determining financial qualifications of broadcast applicants by "...judicial bending of long-standing FCC qualifications standards...."). This claim is completely inaccurate as reflected in the court of appeals opinion. The court merely stated that the bank letter of Valley met the "reasonable assurance" standard of the Commission and stated further (Pet. App. 15a):

> "We do not foreclose Commission consideration of Valley's complete financial qualifications."

The Court of Appeals in no way has usurped the Federal Communications Commission's statutory role in determining licensee qualifications.

CONCLUSION

There is, therefore, no substantial reason for this Court to grant the petition for certiorari and, accordingly, it should be denied.

Respectfully submitted,

EDWARD P. MORGAN
JOSEPH M. MORRISSEY
ROBERT T. MURPHY
Attorneys for Respondent
Las Vegas Valley
Broadcasting Co.

WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006

March 8, 1979